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No. 03-1693

In The
Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY,
Petitioner,

vs.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals For The
Sixth Circuit

BRIEF OF *AMICI CURIAE* ATHEIST LAW CENTER *et al.*, IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The Atheist Law Center, which coordinated representation of all *amici* here, is a nonprofit Alabama corporation whose mission is educational and legal advocacy on behalf of citizens who espouse no religious belief. When Alabama Chief Justice Roy Moore erected a 5,280-pound granite Decalogue in the rotunda of the Alabama Judicial Building and indicated that doing so was homage to the foundations of American law, the Center requested to display a model of an atom to symbolize the contributions of rationality and Enlightenment philosophy to American law and was refused. The Center is joined by Alabama *amici* Pat Cleveland, president of the Alabama Freethought Association, who was involved in 1990s federal and state cases challenging then-circuit judge Roy Moore's sectarian courtroom prayer and Decalogue display over the judicial bench; Michael Chandler, a DeKalb County Baptist, parent, and school administrator who challenged Alabama's fourth school-prayer statute enacted within a fifteen-year period; and Wayne and Sue Willis, Jewish parents who challenged religious harassment and Establishment Clause violations in rural Pike County, where their children were the only Jews in the school

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[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk. *Amici* also submitted a brief in the simultaneously pending case of *Van Orden v. Perry*; this brief is substantially the same but for additions in Part III.

system.[2]

Other Alabama *amici*, who have followed with alarm Alabama's several well-publicized theocratic flirtations over the past decade, are the Wiregrass Atheists, the United Universists and the Birmingham Atheists (formed in response to Chief Justice Roy Moore's installation of the granite Decalogue). *Amici* Dallas-Fort Worth Metroplex Atheists, North Texas Church of Freethought in Dallas, Texas, and Camp Quest (a Kentucky corporation that runs an atheist summer camp) have a particular interest in this case since Decalogue cases from their home states simultaneously pend here; Camp Quest has a direct concern about the government property in this very case.

These *amici* are joined by Scouting for All, which seeks to influence the Boy Scouts of America (BSA) to stop discriminating on the basis of spiritual beliefs or sexual orientation; Rob Sherman Advocacy of Chicago, Illinois, whose founder has challenged BSA's religious oath and discrimination against atheists; Atlanta Freethought Society; Unitarian Universalist Infidels; East Bay Atheists (San Francisco); Atheist Station (Altoona,

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[2] These plaintiffs, who were represented by counsel of record here, experienced community harassment that variously included death threats, vandalism, and ostracism. Cleveland received suspicious mail that necessitated law enforcement use of water cannons; Chandler and his wife, also a teacher in DeKalb County, were hounded into early retirement and their son endured taunting; the Willis family's children suffered assaults, offensive graffiti, taunts, and forced participation in Christian activities before the family decided to leave Alabama.

Pennsylvania); the Military Association of Atheists and Freethinkers; Minnesota Atheists; Boulder Heretics (Colorado); the Secular Student Alliance; and the New Orleans Secular Humanist Association. All of these *amici* are nonprofit, humanist, atheist, or freethinker organizations with regional or national membership dedicated to strict separation of church and state. *Amicus* EvolveFISH is a commercial concern which creates and distributes symbols and materials in the U.S., with particular emphasis on regions where church/state violations have been most pronounced.

All *amici* have an interest in defending the principle often articulated by this Court that the state may not favor religion over irreligion. All oppose government action that confers privilege on religious citizens and which renders citizens who do not share dominant religious beliefs (or any religious beliefs) "outsiders." All subscribe to James Madison's warning that "it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens." *The Complete Madison* 299-301 (S. Padover, ed. 1953) (quoting from "Memorial and Remonstrance Against Religious Assessments, 1785"). *Amici* offer this brief because this case presents a danger of deviation from the cherished principle that atheists, dissenters from majoritarian compunctions to civic religion, freethinkers, humanists, and infidels are "constitutional people" entitled to First Amendment protections.

SUMMARY OF THE ARGUMENT

The Establishment Clause forbids government from telegraphing to nonreligious citizens that they are less than valued members of the political community. When the state chooses to place religious symbols on public property, particularly at the seat of government, its choices have the expected effect of symbolically uniting the governmental and religious messages.

The "reasonable observer" standard presently employed to test for government endorsement of religion fails to take account of the evocative power of symbols in government's hands and fails to appreciate how religious symbols can be used as cudgels against those who do not subscribe to "mainstream" American religions or to any religion at all. It rests on assumptions that undercut Establishment Clause values and on false analogies.

The Court should abandon the reasonable observer standard and adopt a strong presumption that displays on public property that symbolically unite government and religion are unconstitutional.

ARGUMENT

The Establishment Clause rests "on the belief that a union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). It also tends to inject divisiveness detrimental to the social good and antithetical to constitutional guarantees of freedom of conscience. As the Court has observed, "The centuries immediately before and

contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions . . ." *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-9 (1947). While religion may provide "spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance." *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985), *overruled in part on other grounds*, *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

But it is not only sectarian bullying that the Establishment Clause proscribes. "[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985).

The Court's recognition that government should not use its bully pulpit for the benefit of an "elect" among the faithful is plain in the language of its *Lynch/Allegheny* regime, which commands the state not to "send[] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 495-96 (1989) (quoting *Lynch*, 465 U.S. at 687) (O'Connor, J.,

concurring).

The state's appropriation and emplacement of religious symbols telegraphs the theocratic chauvinism that this Court has proscribed. In cases too numerous to cite, this Court has proclaimed that government may not favor religion over irreligion – and yet government Decalogues proliferate.

Amici suggest that Decalogues proliferate because the "ins" and "outs" dichotomy of *Lynch/Allegheny* is undercut by the "reasonable observer" standard articulated in those very cases – a standard that is insufficiently respectful of nonadherents and which lends itself to levels of abstraction and rationalization that militate against effective Establishment Clause enforcement. The "reasonable person" standard ignores what we know of the visceral way in which the populace responds to symbols served to it by government, and is too amenable to legitimating endorsements because it provides little more than a silhouette to lower courts (merely instructing them that an endorsement problem is "a legal question to be answered on the basis of judicial interpretation of social facts"). *Lynch*, 465 U.S. at 693-94 (O'Connor, J., concurring).[3] It gives license to disregard the obvious

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[3] Lower courts as well as some Justices, scholars and irreligious citizens may believe that *Lynch* and *Allegheny* broadly legitimate state displays of religious symbols. In each, the Court examined a Christian creche. In each, it applied largely the same test. And yet it struck one display while sustaining the other. *Allegheny* itself, in examining a menorah and Christmas tree in addition to the creche, seemed to some members of the Court internally inconsistent. The fact that the creche was struck in *Allegheny* while the Christmas tree and menorah escaped scrutiny, and the Christmas tree was even held to "secularize" the menorah, mystified three dissenting Justices. *See* 492 U.S. at 638-46 (Brennan, J., dissenting) (joined by Marshall and Stevens, JJ.). Justice Stevens believed that the juxtaposition of the menorah and Christmas tree, far from secularizing either symbol, reinforced the religious character of both. *Id.* at 654-55 (Stevens, J., dissenting).

import of the symbol itself as well as the dispositive fact that government has incorporated it as government's own speech, on government property[4] and instead to fixate on the degree of congruence with a faulty analogy to a museum and the phantom of "history."

A different standard, which Justice Stevens has suggested, would be more respectful of nonadherents and in harmony with the proposition that the Establishment Clause protects atheists no less than Baptists who disapprove of prayer over school intercoms. A different standard would indicate a practical appreciation of the way in which governments deploy symbols and citizens synthesize them. For ultimately, the process of sending and receiving the message is the issue. Just as an appropriate constitutional test demands that we distinguish between real threat and mere shadow, *Abington School District v. Schempp*, 374 U.S. 203 (1963) (Goldberg, J., concurring), it must also strictly police against displays that forge a symbolic unity between religion and government.

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[4] Indeed, one wonders if "endorsement" is actually descriptive of a scene in which government has incorporated a religious symbol into a permanent display on its property.

I. THE COURT'S "REASONABLE OBSERVER" IS LEARNED IN THE LAW BUT NOT A STUDENT OF REALISM, AND HE SHOULD BE RETIRED.

Pavlov, it seems, never met Pinette. Scholars of politics, no less than of the arts, have taken note that all the world's a stage. As the pioneering political scientist Murray Edelman has explained, the evocative power of symbols in public settings results *precisely from the fact that government has ordained the content and provided the stage*:

> The courtroom, the police station, the legislative chamber, the party convention hall, the presidential and even the mayoral office, ... all have their distinctive and dramaturgical features, planned by the arrangers and actors in the event and expected by their audiences ...
> ...
>
> The common element in the political settings mentioned here and in others that could have been mentioned is their contrived character. They are unabashedly built up to emphasize a departure from [peoples'] daily routine, a special or heroic quality in the proceedings they are to frame. Massiveness, ornateness and formality are the most common notes struck in the design of these scenes, and they are presented upon a scale which focuses

> constant attention upon the difference between everyday life and the special occasions when one appears in court, in Congress, or at an event of historic significance.
>
> We know something of the impact of the manifestly contrived setting .... Such backgrounds make for heightened sensitivity and easier conviction in onlookers, and the framed actions are taken on their own terms. ... The creation of an artificial space or semblance thus sets the stage for a concentration of suggestions: of connotations, of emotions, and of authority. ... Through the creation of an artificial space a particular set of impressions and responses can be intensified, serving to condense and organize a wide range of connotations, free of the irrelevancies, distractions, and qualifications of which everyday life mainly consists.
> ... The conspicuousness with which a setting is presented for observation and special attention in any social situation defines the degree to which an audience is being injected into an artificial universe or semblance. The latter in turn makes easier the functioning of evocative . . . symbolism . . . and involves a corresponding diversion of attention from cognitive and rational

> analysis and manipulation of the environment ... [C]ognitive manipulation of the environment or of referential symbols [will] produce a desired result ... [such as putting the focus] upon abstractions that powerfully grip emotions. [This is] not because there is a demonstrable tie to desired results, as in logical or mathematical manipulation, but precisely because there is no tie to consequences at all, no means of verification. People are therefore free to assure each other that the symbol means what they all passionately want it to mean: rain, fertility, a good crop, or another shared need. ... Social suggestion, not individual work and verification, becomes the stimulus of activity, and what is suggested is implicit in the setting.

Murray Edelman, *The Symbolic Uses of Politics* 95-98 (8th ed. 1977).

Manipulation of symbols within governmental settings is designed to: (1) impress a large audience (as opposed to one-on-one persuasive discourse); (2) legitimize future acts or policies of government, maximizing the chances that citizens will acquiesce in the rules they embody; and (3) establish or reinforce the citizen's definition of himself through identification with the polity or public officials. *Id.* at 98. Symbols of majoritarian preference thus become self-reifying. While government is always making a calculation in choosing

and staging symbols, the citizen's response is more primitive than cerebral, hinting that Justice Kennedy, as he facetiously wondered if an Establishment Clause standard could be derived from "intuition and a tape measure," was on to something. *See Allegheny County*, 492 U.S. at 675 (Kennedy, J., dissenting).

We do not hold court in meat-packing plants or water parks, but rather in settings that amplify the seriousness of the proceedings that occur there. "The judicial bench and chambers, formal, ornate, permanent and solid . . . 'prove' the deliberateness, scholarliness, and judiciousness of the acts that take place in them, even [if] careful study of some of these acts in a university or newspaper office (different settings) may indicate they were highly arbitrary, prejudiced, or casual." Edelman, *supra*, at 99.

In sum, settings for governmental action and symbols used by government are not neutrally chosen and are not meant to be innocuous. Careful staging of symbols offers or reinforces government's motivation. *Id.* at 101-02. Symbols are, moreover, durable, replicating on repeated exposure the same emotions they evoked on a first viewing, so that the setting in which government places a symbol is part of its effort to influence citizens' value structures. *Id.* at 106.[5]

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[5] Many years before the Court had developed formal tests for Establishment Clause analysis, it understood that symbols are irresistible preceptorial tools for government, writing:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or

If this theory of why government chooses to control not merely the message but also every nuance of the medium is sound, this Court's "reasonable person" standard underestimates the potency of symbols by overestimating the rationality of responses to them. Symbolic recognition and actuation does not operate on the cool plane of law where precedents, at least in theory, are dispassionately weighed against the particular reindeer, creche, and Christmas tree *du jour*. The Court's reasonable observer is an abstraction considerably removed from the masses who participate in cultural symbols offered to them rather than merely passively and neutrally filtering them. Such a standard is better understood as the judiciary mirroring itself through the glass of precedent

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> flag to symbolize some system, idea, institution, or personality is a shortcut from mind to mind. . . . Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance and respect: a bowed or barred head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943). In the context of Decalogue displays, for example, just as Alabama Chief Justice Roy Moore intended in installing a 5,280-pound granite monument in the hushed marble rotunda of the Alabama Judicial Building, cordoned off with red velvet, visitors were moved to bow their heads or bend their knees and pray. *See Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003).

than as a measure that accounts for an ordinary citizen's reality. At any rate, the standard the Court has chosen permits capitulation to the state's religious message far too easily. This is strangely incongruous, since the Court at the same time it purports to apply this standard recognizes that people react emotionally far more than cerebrally to symbols, that they react like "insiders" or "outsiders." The Court's insider/outsider dichotomy captures a central value of the Establishment Clause, even as the reasonable observer standard steers clear of the viscera.

II. THE REASONABLE OBSERVER STANDARD DEVALUES NONADHERENTS AND OVERVALUES "HISTORY."

Ironically, the reasonable observer standard coexists in cases in which the Court's discussions reaffirm the commitment to avoiding preference for religion, even while the standard itself has pedigreed governmental favoritism for America's "mainstream" religions. *See* John E. Thompson, *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 Harv. C.R.-C.L.L. Rev. 563 (2003). References to (one, singular) God abound in the Court's lexicon, thus implicitly privileging monotheistic Christians and Jews as a starting point. *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Professor Tribe has wondered why the perspective to be applied in the *Lynch/Allegheny* regime is that of the reasonable "observer" rather than the reasonable "nonadherent." *See* Lawrence Tribe, *American Constitutional Law* 1293 (2d ed. 1988). In fact the concern

for nonadherents expressed in *Lynch* and *Allegheny* is undone by the adoption of the reasonable observer as the benchmark of constitutionality. The nonadherent entitled to constitutional solicitude by the lights of these very cases is transformed by comparison to his "reasonable observer" counterpart into a person of trifling concern whose piddling grievances can be dismissed, and dismissed with an epithet, at that. A person who objects to Decalogues, Latin crosses, or other State religious promotions in core government buildings, parks, or public schools can be rejected as an "isolated" nonadherent who feels mere "discomfort [at] viewing symbols of a faith to which [he] does not subscribe," *Cap. Sq. Rev. Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring); an "uninformed" "heckler," *Van Orden v. Perry*, 351 F.3d 173, 178 (5th Cir. 2004), *cert. granted*, No. 03-1500, 2004 U.S. LEXIS 6691 (Oct. 12, 2004); "fastidious," *Zorach v. Clauson*, 343 U.S. at 313; or "fevered." *See Newdow v. United States Cong. (Newdow I)*, 292 F.3d 597, 614 (2002) (Fernandez, J., concurring in part and dissenting in part) (individual opinion later withdrawn). Indeed, one wonders if some of these cases contemplate that a nonadherent could be reasonable.

Rejection of the "reasonable nonadherent" standard posed by Professor Tribe has resulted in an endorsement analysis that, if not uniformly prone to assailing atheists for their febrile brains, is far too susceptible to majoritarian taint. *See* Charles Gregory Warren, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*, 54

Mercer L. Rev. 1669, 1712 (2003). Thus it is perfectly natural that Justice Brennan, even in dissent in *Lynch*, took it as a given that courts will have to struggle to disentangle themselves from ingrained majoritarian habits of response in order to declaim of municipal creches: "[t]his case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable." *Lynch*, 465 U.S. at 696 (Brennan, J., dissenting).[6] Ironically, one of the reasons the *Lynch* majority gave for rejecting a standard that would produce a brighter line is a factor that grows more salient daily and which should have cut the other way – the diversity and pluralism of American society. *Id.* at 678.

Perhaps it is not entirely unsurprising that the reasonable observer standard would legitimate the display of a creche (*Lynch*), of a menorah adjacent to a Christmas tree so huge it dwarfed the menorah (*Allegheny*), and of a Christmas tree itself (*Allegheny*). The Court undertook, it said, to determine whether a reasonable observer would find endorsement – not of a particular sect, but of *religion* – but the question it actually posed to itself in *Lynch* was whether displaying the creche would be perceived by its reasonable observer as conferring a *benefit* on religion. *Id.* at 683. Conferring a benefit is not, of course, the same thing as giving an endorsement or intermingling the

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[6] The words recall those of Justice Jackson, who anticipated the public opprobrium the Court would face in curtailing the majority's preference for a compulsory flag salute: "This case is made difficult not because the principles of its decision are obscure but because the flag involved is our own." *Barnette*, 319 U.S. at 641.

messages of the government and the religious symbol.[7] The Court concluded, having framed the question in these terms, that no more "benefit" was conferred by placing a creche in a city park than by allowing religiously themed paintings to hang in state galleries. *Id.*

But framing the analysis in such terms not only misses the point, but also trivializes the extent to which adherence to a religious creed has been made relevant to standing in the political community. The appropriate question in a display case involves not "benefit" but rather, the existence of the sort of symbolic unity between church and state that the Establishment Clause proscribes. Another way of saying this is in *Lynch/Allegheny* terms; namely, the government cannot welcome only the religiously inclined as citizen/insiders.

As Justice Brennan observed in his *Lynch* dissent:

> The primary effect of including a nativity scene in the city's display is ... to place the government's imprimatur ... on the particular religious beliefs exemplified by the creche. Those who believe in the

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[7] The Court has very clearly distinguished between conferring benefits such as aid to parochial schools and taking action that symbolically links government and religion. That is the whole point of post-*Lynch* cases such as *Agostini*, 521 U.S. at 227-32, partially overruling *Grand Rapids v. Ball*, 473 U.S. 373, because *Grand Rapids* had presumed that a financial benefit was coterminous with symbolic union, and *Mitchell v. Helms*, 530 U.S. 793 (2000). In fact, the "benefit" question is perfectly appropriate for school-aid cases but quite jarring for any other species of Establishment Clause case.

> message of the nativity receive ... .unique and exclusive ... public recognition and approval of their views. ... The effect on minority religious groups, as well as those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It [is] precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit.

465 U.S. at 701. Justice Brennan concluded that "[t]o be ... excluded on religious grounds by one's elected government is an insult and an injury." *Id.* at 709. An insult and injury to nonadherents would persist even if a court were to determine that, as in *Lynch*, no "benefit" of cognizable proportions was conferred on religion.

Simultaneously with its marginalization of nonadherents, the reasonable observer standard invites courts to exalt "history"–whatever they perceive it to be. Even judges whose decisions favor religious displays sometimes understand that the standard seduces some courts into obscurantism. *See, e.g., American Jewish Cong. v. City of Chicago*, 827 F.2d 120, 131 (7th Cir. 1987) (Easterbrook, J., dissenting) ("It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying whether one display is really like another. . . .")

Judge Easterbrook might have wondered as much about the uses of extrinsic forensic history in Establishment Clause cases as about experts dueling over

reindeer-to-creche ratios. There is obviously nothing wrong with, *e.g.*, courts taking account of various incarnations of the religion clauses that differed from James Madison's first draft. Straightforward historical inquiry often yields straightforward answers. The problem is that courts fail to realize that forensic history as used by legal advocates has no resemblance to historical study as practiced by scholars. The courts' too-frequent indulgence of deeply subjective "historical" analysis as part of the reasonable observer inquiry proves the wisdom of Samuel Butler's quip, "God cannot alter the past, historians can; it is perhaps because they can be useful to Him in this respect that He tolerates their existence." Samuel Butler, *Erewhon Revisited* XIV. Indeed, Butler might have noted that God might have particular uses for historians in judicial robes.

The dissenting opinion in the case below typifies the problem: after railing about *Lemon v. Kurtzman*'s "purpose" prong as a means of "psychoanaly[zing] legislators," *ACLU v. McCreary County, et al.*, 354 F.3d 438, *reh'g en banc denied*, 361 F.3d 928 (6th Cir. 2004), it proceeds to cobble together a variety of anomalous or elliptical remarks from Washington and Jefferson tending to show their (or in Washington's case, at least ghostwriter Alexander Hamilton's) religiosity, notes that Congress in 1782 issued a Thanksgiving proclamation urging supplication to the almighty, makes the obeisance required of its genre to de Toqueville's observation in *Democracy in America* that Americans view freedom and Christianity as linked, and swoops in for the *coup de grace*, pronouncing (with no particular authority that would withstand rabbinical or objective secular historians'

scrutiny) that the Ten Commandments played a "foundational role in American law and government." *Id.* at 461-71 (Ryan, J., dissenting).

It scarcely matters if Washington's farewell address or Jefferson's inaugural address extolled the virtues of religion. This may tell us something about their private views, or then again, it may tell us only about their political instincts. One's religious predilections and one's constitutional views may be entirely separate. Even if every delegate to the Constitutional Convention were in the habit of reading Exodus and Deuteronomy daily, it does not follow that delegates would have seen no harm in enshrining the Decalogue as national law. Even if Thomas Jefferson borrowed Blackstone's reference to "the Laws of Nature and Nature's God," this hardly proves that Jefferson was other than a Deist–it does not mean that he would share, *e.g.*, Roy Moore's view of the Biblical "Creator God" discussed in repetitive lawsuits involving Mr. Moore–let alone that a phrase from the Declaration of Independence in common use in 1776 has any bearing on the Establishment Clause. Even if it were a fact that every one of the Framers believed that Jesus is divine and that those who disagree are hellbound, this would be irrelevant, because the Establishment Clause could not countenance this fact. *See Allegheny*, 492 U.S. at 605 n.55 (quoting *Wallace v. Jaffree*, 472 U.S. at 52).

Litigants as well as judges may invoke "history" and original intent to suit the result they wish to reach; "history" confers a patina of legitimacy on many dubious claims. But such uses of history are polemical, not scholarly. Claiming the mantle of history conveys an

impression that accurate and dispassionate archival work has been undertaken and the truth has been excavated. When shibboleths or nubbins of Jefferson's writings at odds with his status as author of the Virginia Statute for Religious Freedom are repeated often enough by allegedly impartial purveyors, their publicists hope that such repetition will make them accepted truths, and that legal and cultural understandings will be changed to reflect the "new" historical "reality."(*See, e.g.*, Br. of the United States at 7-16.) Since layer upon layer of apocryphal sedimentation builds up each time one of these misleading arguments is made, sooner or later the shifting sands of myth, manufacture, or conjecture will take on the solidity of stone. Grave-robbing and posthumous psychoanalysis of persons long dead is a strange way to construe a law for today, all the same.

Of course, those who call on history for justification of majoritarian prejudices should not be surprised when history answers. This Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), demonstrates the malleability of "history." *Lawrence*, in overruling a case decided just 17 years earlier, *Bowers v. Hardwick*, 478 U.S. 186 (1986), also overruled a rationale that depended almost entirely on what *Bowers* purported was an authoritative exegesis of sodomy laws predating even Blackstone. *Lawrence* concluded that *Bowers* was simplistic, that its "historical premises [were] not without doubt and, at the very least, [were] overstated." *Lawrence*, 539 U.S. at 571. Thus, in less than two decades, this Court's own understanding of history–history back to the time of Leviticus–was radically rewritten.

III. THE REASONABLE OBSERVER STANDARD IS INSUFFICIENTLY SENSITIVE TO THE SYMBOLIC UNION OF CHURCH AND STATE WORKED BY PUBLIC DISPLAYS.[8]

Nor are the defects of the "reasonable observer" standard exhausted by discussion of its pejoration of nonadherents and its susceptibility to manipulation in the

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[8] *Amici* by no means suggest that the separate *Lemon* test should be overruled or modified. *See Lemon v. Kurtzman*, 411 U.S. 192 (1973). Indeed, *amici* note that courts often gloss past the part of the "reasonable observer" standard that addresses "what viewers may fairly understand to be the *purpose* of the display." *See Allegheny*, 492 U.S. at 522 (O'Connor, J., concurring) (emphasis added). *Lemon* is a useful reminder that government's purpose matters, and is particularly instructive for the two display cases pending here: one in which government sought through retrospective subterfuge to sanitize a display already ruled unconstitutional (*this case*), and one in which a stone monument was erected as part of the Fraternal Order of Eagles' campaign to persuade governments to outfit public parks and buildings with Ten Commandments plaques and monuments, ostensibly to deter juvenile delinquency (instead of, for example, to distribute juvenile justice codes in schools or to start after-school programs) (*Van Orden*). *Lemon* probes governmental motivations without distraction, and neither *Lemon* nor ancillary cases dealing with sham purpose or government's usage of a religious symbol where a secular one would serve government's articulated purpose should be discarded. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987) (sham purpose); *Lynch*, 465 U.S. at 681 n.7 (Brennan, J., dissenting) (choice of religious means over secular alternative). Assuming that there could be a display case in which purpose were not an issue, however, the standard suggested in Part IV of this brief would be easier to apply than *Lemon*, which after all was not crafted in the display context but in a school-aid case.

hands of the forensic historiojurist. While some courts do reach sound decisions even applying a standard that is both tacitly freighted to favor religion and amorphous,[9] the decisional process can be tortuous.

The two Decalogue cases pending here should be judged by the answer to the simple question of whether the display works a symbolic union of government and religion. This question does not require the cogitative peregrinations demanded by the reasonable person standard. The displays in each case are plainly unconstitutional if the factor for which we are testing is symbolic union that reinforces the faithful and alienates everyone else. Cramped spelunking into ill-fitting museum analogies and projection of majoritarian religious bias onto the reasonable observer who functions as a judge-penitent are distractions from this central question.

The dissimilarity in the physical arrangement of the religious symbols in *Van Orden* and this case and the differing results reached by the courts below highlight the circuity of the reasonable observer route. The *Van Orden* display is widely disaggregated, while the display here is a congeries. The Fifth and Sixth Circuits, like their sister circuits in other Decalogue cases, parsed the minutiae of physical arrangements and tried to negotiate the conundrum.

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[9] *E.g., Indiana CLU v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001). Notably, in addition to its reasonable observer analysis, that court focused extensively on whether a planned 11,500-pound stone Decalogue would effect a "symbolic union of church and state" signaling approval to adherents and disapproval to nonadherents. *See* 259 F.3d at 771-72.

In the cases whose physical settings most closely resemble that of *Van Orden,*[10] the courts have devoted extended discussion to whether the setting is "museum-like," which quality legitimated *Lynch*'s creche. *See* 465 U.S. at 676-77 ("The National Gallery in Washington, maintained with Government support ... has long exhibited masterpieces with religious messages. ..."). The analogy was inapt in *Lynch* and remains so. Government museums provide a forum for a variety of artistic representations without endorsing any. A Dutch master's work might hang adjacent to a Russian icon or "The Last Supper" – or any of these works could hang on a museum wall as its sole adornment without sending a message of governmental approval.

The court below noted the disparity in function between a museum and a courtroom and cogently explained another reason that the metaphor is anomalous.

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[10] Not coincidentally, these cases involve displays in which the Fraternal Order of Eagles persuaded government to donate public space for the FOE's gifts of Decalogues. *See O'Bannon*, 259 F.3d 766 (Decalogue monument to be placed on grounds of complex of civic buildings spanning two acres and containing a dozen separately spaced monuments); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003) (monument was to be placed on Capitol grounds near other government buildings, near the road, and was particularly prominent due to proximity of "floral clock"); *ACLU v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), *vacated by and reh'g en banc granted by*, 2004 U.S. App. LEXIS 6636 (8th Cir. Apr. 6, 2004) (Decalogue in large city park, not near government buildings, and monument stood alone). The FOE's campaign on behalf of governmental Decalogue displays is detailed in the original *Plattsmouth* opinion.

Citizens come to courthouses to obtain enforcement of the laws; they are rarely there other than "by necessity – whether they are on trial for a crime, have been subpoenaed as witnesses, are seeking to vindicate their civil rights, have been called to jury duty or are simply contesting parking tickets, registering to vote or renewing their driver's licenses. County courthouses also exude a coercive pressure, ranging from compulsory jury service to bench warrants to judicial decrees." 354 F.3d at 461. Museums share none of these attributes.

The Seventh Circuit, considering the museum analogy where various statues and monuments occupy not city parks but core municipal buildings or grounds of government offices, noted that even if a multiplicity of statues rendered the grounds arguably "somewhat akin to a museum," any conclusion that this neutralized the religious meaning of the Decalogue was wrong. It concluded, "This is not some museum nestled in some secluded park. The grounds, which house, among other things, the Capitol, the Governor's office, the General Assembly, the Indiana Supreme Court, and the Indiana Court of Appeals, is the seat of Indiana government." *O'Bannon*, 259 F.3d at 772. Such "displays at the seat of government [merit] particularly careful scrutiny" because they "run[] a special risk of making religion relevant, in reality or public perception, to status in the political community." *Id.* (citing *Allegheny*, 492 U.S. at 626 (O'Connor, J., concurring)). *Accord Adland*, 307 F.3d 471. *See also ACLU v. McCreary County*, 361 F.3d 928, 932 (order denying rehearing *en banc*) (6th Cir. 2004); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000);

American Jewish Cong. v. City of Chicago, 827 F.2d 120, 128 (7th Cir. 1987).

In *Van Orden*, the monument is not only on the grounds of the seat of government, but it was approved by the Fifth Circuit because it is "at a point on the direct line between the legislative chambers, the executive office of the governor, and the Supreme Court Building. It is plainly linked with those houses of the law ..." 351 F.3d at 181. This, of course, is a significant reason that the monument should not be sustained, as the Seventh Circuit would have held on *Van Orden*'s facts, to judge from its reasoning in *O'Bannon*.

Blatant symbolic conflation of divine law and man's law is prohibited. This conflation is also why the staging of the Bill of Rights, a few documents from historical figures or Congress referencing wholly religious matters, and the Ten Commandments in a putative "Foundations of Law" display in courthouses and schoolhouses was rightly prohibited by the panel below in *McCreary*.

Courts that instinctually reach toward the symbolic union question as the heart of the matter recognize that it is not metaphors but effects that count. When government deliberately places its own secular texts or symbols prominently with religious texts or symbols, it is not constructing an innocuous exhibit that neutralizes the message of the religious artifacts. Far from secularizing the religious symbols, it is identifying the most cherished emblems of its statehood with the religious message. *See McCreary*, 354 F.3d at 460; *O'Bannon*, 259 F.3d at 773 (where Bill of Rights and Indiana Constitution's Preamble referencing "Almighty God" are placed with sacred texts,

this "signals that the state approve[s] of such a link and [is] sending a message of endorsement"); *Books*, 235 F.3d at 307 (FOE Decalogue topped by American eagle gripping the national colors in its talons symbolically equates government and religion and is thus an endorsement); *ACLU v. Ashbrook*, 375 F.3d 484, 494 (6th Cir. 2004) ("[b]y placing the Decalogue in apparent equipoise with the Bill of Rights" the state creates the impression that it equates civil law with a divine code); *Adland*, 307 F.3d 471 (monument on Capitol grounds featuring American flag in the eagle's talons along with the Decalogue, Chi and Rho, and the all-seeing eye of Providence impermissibly links government and religion); *Harris v. City of Zion*, 927 F.2d 1401, 1412 (7th Cir. 1987) (Latin cross surrounded by symbols of city on municipal seal forged symbolic link between Christianity and government). The cases just referenced reached the right results because they, unlike *Van Orden*, asked the right question.

IV. JUSTICE STEVENS HAS PROPOSED A BETTER APPROACH THAN THE REASONABLE OBSERVER STANDARD.

As explained above, the reasonable observer standard tempts courts to ask the wrong questions and ratifies implicit biases toward "mainstream" monotheistic religions. It is, moreover, so unstructured that it confuses those who must apply it. Of *Allegheny*'s counterintuitive conclusion that one religious symbol could secularize another in the reasonable observer's eyes, Justice Brennan remarked:

> I do not know how we can decide whether it was the tree that stripped the religious connotations from the menorah, or the menorah that laid bare the religious origins of the tree. ... But I shudder to think that the only 'reasonable observer' is one who shares the particular views on perspective, spacing, and accent expressed in [the majority's] opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law.

492 U.S. at 643 (Brennan, J., dissenting).

Justice Stevens has proposed a baseline rule that respects core Establishment Clause values and which would inject clarity. He would "create a strong presumption against the display of religious symbols on public property." *Allegheny*, 492 U.S. at 650 (Stevens, J., dissenting). This presumption would "prohibit a display only when its message, evaluated in the context in which it is presented, is nonsecular." *Id.* at 652.[11] In other words,

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[11] This formulation is perhaps more permissive than Justice Brennan's would have been. *See id.* at 637 (Brennan, J., dissenting) ("I continue to believe that the display of an object that 'retains a specifically Christian' [or other] religious meaning ... is incompatible with the separation of church and state demanded by the Constitution") (internal citations omitted); *id.* at 643 (stating that the Court's recognition that "the menorah is a religious symbol" "should have been the end of the case"). While *amici* agree with Justice Brennan, they realize that the Court is unlikely to do so here.

Justice Stevens would ask whether the religious and civil messages are impermissibly linked. His presumption would screen for the symbolic union the Constitution forbids, leaving unmolested friezes that commemorate not great proselytizers but great lawgivers even if Moses is depicted among them, *id.* at 652-53, while it would proscribe "a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall." *Id.* at 652. His presumption would also proscribe a courtroom carving of Moses, Confucius and Mohammed because such a display would honor religion as surely as would the erection of a "Latin cross on the roof of city hall." *Id.*

Justice Stevens' suggestion should not be rejected out of hand as "hostile to religion," because as just demonstrated, it is hostile only to endorsements of religion, which should be unobjectionable. Justice Stevens' presumption would be raised only in the display arena; it would not bar the *study* of the Ten Commandments in public schools, but merely prevent their posting on a schoolhouse wall with no evident secular context. *See Stone v. Graham*, 449 U.S. 39, 42 (1980) (contemplating that Commandments may be integrated into a study of history, civilization, ethics, or comparative religion even though they may not be posted on schoolhouse walls). The Court is free to employ whatever hypothetical constructs it thinks useful to lower courts in assessing the application of the presumption in particular cases; the existence of the presumption as a starting point would no doubt render any factors the Court would choose more clear than the present "reasonable observer" standard.

Adoption of Justice Stevens' presumption would be fair to all citizens in refusing to permit the organs of government to be appropriated by aspiring theocrats. It would greatly aid in depoliticizing the Establishment Clause, which was designed to withdraw rights of conscience "from the vicissitudes of political controversy." *Barnette*, 319 U.S. at 638. It would mark an improvement in judicial understanding of what symbols mean, politically and religiously. This Court should, accordingly, revisit Justice Stevens' dissent in *Allegheny* and consider the evident as well as the latent flaws of the current standard discussed by *amici*.

CONCLUSION

The Constitution's solicitude for "constitutional people" who do not believe in deity is subverted by a reasonable observer standard which subtly incorporates or ratifies "mainstream" monotheistic assumptions. This renders these constitutional people, too often, constitutional strangers. The Court's current standard fails to appreciate how actual nonhypothetical citizens react when government communicates through symbols. Religious symbols in or near core government buildings are particularly evocative because they marry the visual majesty of government to those religious symbols. This Court should adopt a standard that is equal to the aspiration of treating religious adherents and nonadherents exactly the same.

Respectfully submitted,

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